88-1107 (1)

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MATHAS BROWN,

PETITIONER,

v.

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of Fort Lauderdale, RON COCHRAN, in his official capacity as Chief of Police of the City of Fort Lauderdale Police Department,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MATHAS BROWN
1613 NORTHWEST 13th St.
FORT LAUDERDALE, FL. 33311
TEL. (305) 524-9071

QUESTIONS PRESENTED FOR REVIEW

1. If an order of partial dismissal disposes of more claims than it retains, is it a final order?

2. If petitioner proves that respondents were erroneously granted qualified immunity, before the conclusion of the case, does he have the right to appeal the decision?

3. When does petitioners entitlement to less stringent standards as a pro se litigant begin?

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1. Conley v. Gibson, 732 F.2d. 885 (11th Cir. 1984) ..... pages 7, 8, 9.

2. Faulk v. City of Orlando, 731 F.2d. 787 (11th Cir. 1984) ... page 21.

3. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed. F.2d. .... pages 20, 30.

4. Harlow v. Kerner, 457 U.S. 800, (1982) ..... pages 11, 18 .

5. Williams v. Bishop, 732 F.2d. 885 (11th Cir. 1984) .... pages 7, 8, 9.

6. Rules of The Supreme Court of The United States, Rule 17(a) "consideration governing review on certiorari," .... page 6

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IN THE

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OCTOBER TERM, 1988

No. _____

MATHAS BROWN,

PETITIONER

v.

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of Fort Lauderdale, RON COCHRAN, in his official capacity as Chief of Police of the City of Fort Lauderdale Police Department,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Mathas Brown, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit

entered on September 30, 1988.

OPINION BELOW

The court of Appeals entered its decision dismissing the Petitioner's appeal for lack of jurisdiction on September 30, 1988. A copy of the decision is attached as Appendix A.

The court denied petitioner's petition for rehearing and suggestion for rehearing en blanc on October 31, 1988. A copy of the order is attached as Appendix B

The district court issued an order of partial dismissal of the petitioner's second amended complaint on June 21, 1988. A copy of the order is attached as Appendix C

The district court denied petitioners motion for hearing on court's order of partial dismissal on July 22, 1988. A copy of the order is attached as Appendix D.

The district court denied petitioners motion for reconsideration of hearing and discussion of defendant's answer on August 8, 1988. A copy of the order is attached as Appendix E.

JURISDICTION

On September 30, 1988 the Court of Appeals entered judgment dismissing the petitioner's appeal for lack of jurisdiction. (App.A). The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTION PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person... be deprived of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

On 12 July 1988, petitioner filed a Notice of Appeal to the Eleventh Circuit Court of Appeals, regarding an order of partial dismissal rendered on 3 August 1988. The petitioner received a memorandum from the Eleventh Circuit Court regarding jurisdictional questions the court had. The petitioner submitted his position regarding the jurisdictional questions, and on 30 September 1988, a panel of the Eleventh Circuit Court of Appeals, dismissed the petitioner's appeal for lack of jurisdiction (App. A).

REASON FOR GRANTING THE WRIT

The petitioner has met the standards outlined in the Rules of the Supreme Court, Rule 17, "consideration governing review on certiorari," and submits them as a basis for granting a review on writ of certiorari. Rule 17, subsection (a) states:

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;

In Williams v. Bishop, 732 F.2d. 885 (11th Cir. 1984), the appellate court established that an order is not a final order if it disposes of fewer than all claims of all parties to the action. The decision was also one of the two jurisdictional questions placed before the parties in determining if the appellate court had jurisdiction over the petitioner's appeal. See attached Jurisdictional Questions EXHIBIT 43 page 65.

On 21 June 1988, Honorable Judge Kenneth Ryskamp issued an order of partial dismissal of the second amended complaint submitted by the petitioner, Mathas Brown. (App. C page 36). The second amended complaint cited the following named respondents with the following violations: City of Fort Lauderdale, violation 42 U.S.C. §1983 and §1981; Ron Cochran, violation 42

U.S.C. §1983 and §1981; Constance W. Hoffman, violation 42 U.S.C. §1983 and §1981. The only claim remaining in this action is the petitioner's 42 U. S.C. §1981 claim against Police Chief Ron Cochran. The petitioner is arrearing pro se in this litigation, and has difficulty understanding how an order dismissing two out of three respondents and five out of six cited violations, constitutes an order disposing of fewer than all claims of all parties to the action.

The decision rendered in the petitioner's case, is in direct contrast with the Williams v. Bishop decision, which coincidentally, was rendered by the same appellate court. Unlike the petitioner's case, the Williams v. Bishop decision, disposes of two of the five claims. With three claims pending in the district court, it is clear that the

Williams v. Bishop decision, meets the standard of having dismissed fewer than all claims of all parties to the action.

The order of partial dismissal of the petitioners case should be accepted as a final order, appealable under it's own rights, since all respondents except one, and all cited violations, except one, have been dismissed. If not accepted as a final order, the petitioner, will have to wait an interminable amount of time before he can appeal practically his entire case.

It must be noted that the judge in the Williams v. Bishop case, did not enter the finding required under Rule 54(b) F.R.C.P., to the effect that there was no cause for delay. Similarly, the order of partial dismissal of the petitioners case, also does not contain a certificate pursuant to F.R.C.P. 54(b). The petitioner,

appearing pro se in this litigation, is not only unable to address the issuance of the certificate with the district court judge, but he is also unable to request direction from the court, on what is needed to obtain the certificate. There have been two documented attempts made by the petitioner, to meet with the district court judge regarding direction in this case, but both request have been denied. See attached Appendix D and E pages 41 and 42

The petitioner agrees that this case would more judiciously be served if considered and reviewed together at one time, rather than in a piecemeal fashion. To allow only one portion of this case to continue, while the majority remains dismissed, is contradictory to the case being conducted in a piecemeal fashion. If the one matter currently before the district

court is resolved in that court, the petitioner will then be permitted to address the majority of his case with the appellate court. If successful with the appeal, the petitioner must again return to the district court to resume where he left off with the majority of his claims. This appears to most definitely meet the criteria of being conducted in a piecemeal fashion.

The second jurisdictional question placed before the petitioner, was if the order of partial dismissal, dismissing certain claims on the basis of qualified immunity, is not an appealable order as to the plaintiff, but would only be appealable if it denied the defense? (attached EXHIBIT 43 page 65)

In light of Harlow v. Fitzgerald, 457 U.S. 800 (1982), the appeal court purged the qualified immunity doctrine of its subjective component and held

that:

> "government officals performing discretionary functions, generally are sheiled from liability for civil damages insofar as their conduct does not violate a clearly established statutory or constitutional rights of which a reasonable person would have known."

The words "discretionary functions," are extremely relevant in this standard. They have been placed in the standard to prevent government officials, from abusing their position and authority. It places a fundamental limit to the concept, thus allowing one to assume that the actions of the governmental officials were conducted in "good faith." To supersede ones authority, opens up the very real question of ones' actions, honestly being conducted in good faith. Discretionary function in this context, means that the government officials, (namely the respondents in this case), must be making choices, or acting within the limits of their authority. On

June 19, 1986 the respondent, Police Chief Ron Cochran, did suspend and terminate the petitioner, and in so doing, the respondent supersede his given authority. A copy of the suspension/termination letter to the petitioner has been submitted into evidence as Exhibit B. Ron Cochran was limited in his authority to making recommendations to the City Manager, regarding suspensions, demotions, or dismissals. A copy of the Rules, Regulations, and Procedures manual outlining the authority governing the Chief of Police, has been submitted into evidence as EXHIBIT D. Thus, the respondent, Police Chief Ron Cochran, a government official in this case, was by no means exercising one of his discretionary functions, when he suspended and terminated the petitioner.

The respondent Constance W. Hoffman, as City Manager for the City of Fort

Lauderdale, is also responsible for enforcing the Rules, Regulations, and Procedures of the City of Fort Lauderdale. Respondent Hoffman, in her official capacity as City Manager, concurred with the suspension/termination of the petitioner, by Police Chief Cochran. Ms. Hoffman stated in fact, in her July 3, 1986 letter to the petitioner, that she reviewed the circumstances surrounding the matter. A copy of Ms. Hoffman's letter to the petitioner has been submitted into evidence as EXHIBIT E. The circumstances admittedly reviewed by Ms. Hoffman, were not only questionable, but were groundless and unsubstantiated. Additionally, the circumstances necessitating the petitioners termination, were based upon a non existent ninety (90) day reevaluation. It must be noted, that not only did the petitioner never receive

the required ninety day reevaluation, he was suspended and terminated contrary to the City of Fort Lauderdale and Fraternal Order of Police, Lodge No. 31, Collective Bargaining Agreement. The City has an agreement of termination within the prescribed ninety day period, based upon the results of a reevaluation. A copy of the F.O.P. and City's agreement re: Performance Rating Review, has been submitted into evidence as EXHIBIT A. The petitioner's termination took place approximately one hundred (100) days after the ninety day reevaluation was due (and even then petitioner never received it). In other words, the petitioner, a satisfactory employee, was subjected to the same criteria and subsequent disciplinary action, of an unsatisfactory employee by both respondents, Ron Cochran and Constance Hoffman. Respondent, Hoffman

nevertheless concurred with the suspension and termination of the petitioner, by one not empowered with authority to suspend or terminate anyone.

The petitioner has alleged in his Second Amended Complaint, numerous instances of racial discrimination, that lend credence to the respondents lack of good faith in regards to their actions. One such instance is a perfect example of the racially discriminating customs conducted at the City's police department. In this case the petitioner mentions that Captain Joseph Robinson (Captain of Detectives), was involved in an automobile accident in which he left the scene of the accident. In fact, Sergeant B.W.Smith, had to go to Captain Robinson's home and return him to the scene of the accident after it's commission. Captain Robinson left his gun, badge, and blue light in the

vehicle, which eventually led to the deduction that he had been driving the vehicle. Leaving the scene of an accident is a third degree felony in violation of Florida Statute 316.027. Thus, Captain Joseph Robinson, who in fact, committed a crime, is a white police officer, and did not have to fear termination like the petitioner, because he is still employed, and subsequently subjected to a different standard than the petitioner. See attached motion in opposition to defendants motion to dismiss the second amended complaint, page 48 through 51

The petitioner has been informed that qualified immunity, is an immunity from suit, rather than a mere defense to liability. The petitioner agrees with the court's claim that subjecting officials to trial may lead to "distraction of officials from their governmental

duties, inhibition of discretionary action, and deterrence of able people from public service." Ante, at 526, quoting Harlow v. Fitzgerald, supra, at 816. Qualified immunity protects officials against frivolous litigation, but the deliberate and flagrant violation of the petitioners clearly established constitutional rights against racial discrimination, should not go unnoticed. Racial discrimination, particularly when conducted to the magnitude that it reached in the petitioners case should not be dismissed as frivolous.

The petitioner contends that the entitlement of the respondents to appeal qualified immunity if denied the defense, makes it an arguable issue. If such entitlement had been denied the respondents, they could appeal such ruling, for qualified immunity again, is an immunity

from suit rather than a mere defense to liability. What position however, is the petitioner placed in if qualified immunity is erroneously granted? It appears that if such an issue is arguable and appealable if denied the defense, then it should remain open for discussion, if the petitioner raises meritorious points, which question the feasibility of qualified immunity being granted, when it is in direct conflict with the standard from which it is based. This is a question of exceptional importance, for in this instance, qualified immunity, because it has been granted to the defense, is enabling the respondents to have their bad faith actions, go unredressed until the one claim remaining in the district court has been concluded.

Again, as a pro se litigant, the petitioner is having difficulty under-

standing how Ron Cochran, could perform a duty he by no means is empowered to perform, and have his actions, be accepted as one done in good faith, entitling him to qualified immunity, unappealable by the respondent. The petitioner is of the opinion, that once the lack of entitlement to qualified immunity is brought to light, then the party challenging the entitlement to such immunity, should be allowed an appellate review of the decision. This brings the petitioner to his entitlement, as a pro se litigant, to less stringent standards.

Under Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed. F.2d. 652, a pro se prisoner complaint is governed by "less stringent standards than formal pleadings drafted by lawyers." The petitioner is aware that this is not a criminal proceeding, but is he not entitled to the same less

stringent standards as the pro se litigant involved in a criminal proceeding.

In accordance with Faulk v. City of Orlando, 731 F.2d. 787 (11th Cir. 1984) the allegations of a complaint, must be read in a liberal fashion. The petitioner in this case however, questions when his entitlement to less stringent standards, and to have issues he raises read in a liberal fashion, will take place. As a pro se litigant the petitioner believes it is concievable, that if he correctly expresses his views (although not necessarily in the manner in which an attorney would be expected to) then those views will be well taken and afforded every opportunity to receive a review. The petitioners abilities (as outlined in Ron Cochran's suspension/termination letter) and the fact that the petitioner is writing and conducting his own legal litigation and

briefs, substantiate the contradiction of the petitioners actual abilities and those described by the respondents. Appearing pro se in this litigation, and having been terminated for writing deficiencies, must make one question the petitioners true abilities. This was not a question in the district court, for it decided that the respondents actions were done in <u>good faith</u>. The petitioner contends that the element of good faith, is the one important element missing in this entire equation. Can one honestly say that the actions of the respondents were done in good faith? The petitioner in this case, is merely seeking to have his case, in its entirety, heard on its merits. There are a number of relevant issues the petitioner will address if allowed to appeal it. These issues however, will not be brought to light if this case is halted and not permitted a review

until the Chief Cochran matter is resolved. It seems so unadvantageous to all parties involved, to leave almost all claims raised in this case in limbo, until the one claim is concluded.

The petitioner has raised the question of less stringent standards with both the district and appellate courts. Perhaps the Supreme Court can explain when the petitioners entitlement to less stringent standards begin. The petitioner believes that less stringent standards mean, that he will not be expected to perform as a licensed attorney. He believes that he will be afforded some leniency in the interpretation of his complaint, particularly if he has attempted to support (with incorporated Exhibits) every allegation he's made. The Supreme Court pointed out in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2L.Ed. 2d. 652 (1972), "the Federal Rules of Civil Procedure do not require

a claimant to set out in detail the facts upon which he bases a claim," that is a plaintiff need not prove his whole case in his complaint. Unlike the aforementioned standard, the petitioner so desperately wants his complaint tried in its entirety, that he has come extremely close to having proved his entire case in the second amended complaint. The petitioner questions his entitlement to less stringent standards, in that he is experiencing difficulty in getting an audience with the district court judge. There are a number of possible discrepancies, or should I say questions that the petitioner has regarding the district courts' order of partial dismissal. For example:

1. The petitioners 42 U.S.C Section 1981 claim against the respondent Constance W. Hoffman was dismissed by the district court, without any justification, or

discussion in the order of partial dismissal. The order simply states in it's conclusion (after a brief explanation of why all the other claims were dismissed) that the 1981 claim against the defendant Hoffman is dismissed. See attached App. C-5, page 40. Perhaps the district court does not have to provide the petitioner, with an explanation of why this particular claim and respondent, were dismissed. If this is the case, then it would seem only fair that the pro se petitioner, not be expected to have knowledge of this, thus affording the petitioner an opportunity to have an audience with the district court judge, to discuss the courts decision.

2. The district court makes reference on page one of the order of partial dismissal, to a statement supposedly made by the petitioner in his Amended Complaint.

See attached App. C-2, page 37 . The court stated:

> In paragraph 14 of plaintiff's amended complaint, plaintiff admits that the Fort Lauderdale Police Department does not have a policy or custom whereby the City discriminates against blacks.

This reference to the amended complaint, is extremely confusing to the petitioner, for the district court had dismissed the amended complaint, prior to the issuance of the order of partial dismissal. The order of partial dismissal, (issued on June 21, 1988) is supposedly based on the petitioners second amended complaint. Originally the petitioner, assumed that the district court had merely made a typographical error, and had meant to make reference to the second amended complaint, and not the already dismissed amended complaint. In fact, the state-

ment is the exact opposite of what the petitioner said in his motion in opposition to the defendants, motion to dismiss the second amended complaint. See attached EXHIBIT 42 pages 44-47, 58 & 59. The statement made in the petitioners motion in opposition to the respondents motion to dismiss, were submitted to the court, before the order of partial dismissal was rendered. In his motion the petitioner explained in great detail, the on-going custom of racial discrimination, conducted and accepted at the City of Fort Lauderdale's police department. The petitioner, further supported this claim by reminding the district court, of the 1980 Consent Decree that the City of Fort Lauderdale is currently under. This consent decree was issued by the Federal Courts because of the hirng and promotion practices the City has regarding black and other minorities.

The petitioner is of the opinion that his inability to find the statement he is accused of making, in either the amended complaint or the second amended complaint, warrants his having questions, (as a pro se litigant) regarding the decision. The petitioner believes that his entitlement to less stringent standards, should enable him to have an audience with the district court judge, to ask the aforementioned questions. This belief however, is incorrect, for the district court has refused, on two occasions, to meet with the petitioner, for clarification of the order of partial dismissal. See attached App. D page 41 and App. E page 42. If the questions the petitioner has, are reasonable and allowable, then the petitioner should be so informed by the court. If the questioning is not permissable, then an audience with the court would again clear up this issue.

The petitioner feels that his inability to ask these questions, or to be expected to raise them, is an indication of his not being entitled to less stringent standards as a pro se litigant. Thus, the petitioner places this question in the hands of the United States Supreme Court; When does the petitioners entitlement to less stringent standards begin as a pro se litigant in a civil proceeding? The petitioners denial to an appellate review, of the order of partial dismissal, has allowed the many questions the petitioner is expected to have as a pro se litigant, to go unanswered.

The petitioner is desperately attempting to demonstrate, how this case is deserving of a review. The petitioner has discussed to great length the respondents entitlement to qualified immunity; the petitioners entitlement to "less stringent standards"; and the fact

that all respondents except one, and all cited violations, except one, have been dismissed in his claim.

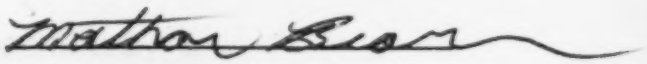
The allegations of the complaint, especially a pro se complaint, must be read in a liberal fashion, and they must be accepted as true in testing their sufficiency, Haines v. Kerner, Supra, thus making the order of partial dismissal a final order, for it does not dispose of fewer than all claims of all parties of the action. In fact the order does the exact opposite, it disposes of more not fewer than all claims of all parties to the action.

CONCLUSION

WHEREFORE, the petitioner prays that the United States Supreme Court extends some leniency and patience with the petitioner, in exercising it's discretionary powers, in that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



MATHAS BROWN
1613 Northwest 13th St.
Fort Lauderdale, Florida
33311

Tel. No. 305/524-9071

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoingPetition For Writ of Certiorari was mailed this 19th day of Dec., 1988 to: DENNIS E. LYLES, CITY Attorney, Attorney for the Respondents, CITY OF FORT LAUDERDALE, P.O. Box 14250 Fort Lauderdale, FL. 33302, ATTN: LINDSEY PAYNE, Assistant City Attorney.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5673

MATHAS BROWN,

versus Plaintiff-Appellant,

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of Fort Lauderdale, RON COCHRAN, in his official capacity as Former Police Chief of the City of Fort Lauderdale Police Department,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Florida

Before FAY, JOHNSON and EDMONDSON, Circuit Judges.

BY THE COURT (September 30, 1988)

The appeal is dismissed for lack of jurisdiction. The order appealed from dismissed the appellant's claims brought pursuant to 42 U.S.C. § 1981 & 1983 against the City of Fort Lauderdale and §1983 claims against City Manager Hoffman and

Police Chief Cochran on the grounds of qualified immunity. The district court, however, permitted the §1981 claim against Cochran to proceed. The order did not constitute a final decision because it did not dispose of the appellant's §1981 claim against Police Chief Cochran, and it did not contain a certification pursuant to Fed.R.Civ.P. 54(b). Accordingly, the order is not final and appealable. Williams v. Bishop, 732 F.2d. 885 (11th Cir. 1984).

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5673

MATHAS BROWN,

versus Plaintiff-Apellant,

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of Fort Lauderdale, RON COCHRAN, in his official capacity as Former Police Chief of the City of Fort Lauderdale Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion _____, 11 Cir., 198__, ___ F.2d.____). (October 31, 1988)

Before PTF/FMJ/JLE

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

the court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

_____

United States Circiuit Judge

ORD-42

APPENDIX B-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 87-6936-CIV-RYSKAMP

MATHAS BROWN,

Plaintiff,

vs.

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of Fort Lauderdale, RON COCHRAN, in his official capacity as Former Police Chief of the City of Fort Lauderdale Police Department.

Defendants.

_____/

ORDER OF PARTIAL DISMISSAL

Plaintiff, a former police officer with the City of Fort Lauderdale (hereinafter the "City"), has filed a second amended complaint, after this court dismissed plaintiff's complaint with leave to amend in an order signed April 12, 1988. The second amended complaint alleges violations of 42 U.S.C. Sections 1983 and

1981.

In paragraph 14 of plaintiff's amended complaint, plaintiff admits that the Fort Lauderdale Police Department does not have a policy or custom whereby the City discriminates against blacks. No allegations have been made that the City has a policy of discrimination implemented or executed by a policy statement, ordinances, regulation or decision officially adopted and promulgated by the City or is "visited pursuant to governmental "custom" even though such custom has not received formal approval through the body's official decision making channels" Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Dismissal with prejudice as to defendant City is therefore GRANTED as to the allegations pertaining to Sections 1983 and 1981.

Plaintiff sues defendants Cochran and Hoffman in their official capacities. Defendants' assert the defense of qualified

immunity for their discretionary acts as government officials. Where, as here, the individual defendants' statutory duties or actions were taken pursuant to their authority, i.e., the dismissal of the plaintiff, plaintiff can only defeat their qualified immunity by proving that:

> the constitutional right allegedly infringed by (the defendants) was clearly established at the time of (their) conduct, (the defendants) knew or should have known of that right, and (that the defendants) knew or should have known that (their) conduct violated a constitutional norm. Procunier v. Navarrette, 434 U.S. 555, 562, 98 S. Ct. 855, 860, 55 L.Ed.2d 24, 31 (1978).

plaintiff has not alleged additional facts in his second amended complaint which would operate to defeat defendant Hoffman's and defendant Cochran'squalified immunity defense. Dismissal with prejudice is proper as to defendants Hoffman and Cochran as to 42 U.S.C. §1983.

Plaintiff has also brought a Section 1981 action against Police Chief Cochran. Plaintiff has made allegations of discriminatory acts by various police officers

and supervisory personnel who disciplined plaintiff because he was black, whereas white police officers were not disciplined for the same actions. Specifically, plaintiff has alleged five incidents where he was reprimanded or given negative evaluations because he was black where white officers were not reprimanded or given negative evaluations for the same behavior. These reprimands and evaluations ultimately led to plaintiff's dismissal by Chief Cochran. Plaintiff further submits that Chief Cochran was aware of these discriminatory practices and allowed them to persist. Plaintiff's allegations present an issue as to whether the plaintiff was dismissed for poor work quality, poor self expression, poor attendance and poor technical efficiency, as stated in his letter of dismissal, or whether intentional discrimination with racial animus existed. Where plaintiff has claimed discrim-

ination because of race plaintiff has stated a cause of action under Section 1981 and plaintiff's claim should not be dismissed. Marquis v. U.S. Sugar Corporation., 652 Fed.Supp. 598 (S.D, Fla.1987). Accordingly, it is hereby

ORDERED AND ADJUDGED that defendants' motion to dismiss plaintiff's Section 1983 claim is GRANTED. Defendant Hoffman and City's motion to dismiss Section 1981 is GRANTED. Defendant Cochran's motion to dismiss Section 1981 is DENIED. Defendant Cochran is ordered to answer the plaintiff's second amended complaint twenty (20) from the date of this order.

DONE and ORDERED at the United States District Court, Miami, Florida this 21 day of June, 1988.

UNITED STATES DISTRICT JUDGE

c.c: all counsel of record

APPENDIX C-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 87-6936-CIV-RYSKAMP

MATHAS BROWN,

Plaintiff,

vs. ORDER

CITY OF FT. LAUDERDALE,
CONSTANCE W. HOFFMAN, and
RON COCHRAN,

Defendants.
_____/

This cause is before the court upon plaintiff's motion for hearing on court's order of partial dismissal filed July 18, 1988.

After a careful review of the pleadings and the court being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is DENIED.

DONE AND ORDERED in chambers at the United States District Courthouse, Miami Florida this 22 day of July 1988

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 87-6936-CIV-RYSKAMP

MATHAS BROWN,

Plaintiff.

vs.

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of FT. Lauderdale, RON COCHRAN, in his official capacity as former Police Chief of FT. Lauderdale.

Defendants. /

ORDER

This cause is before the court upon plaintiff's motion for reconsideration of hearing and discussion of defendant's answer filed August 1, 1988.

After careful review of the pleadings and the court being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is DENIED.

DONE AND ORDERED in chambers at the

United States District Courthouse, Miami, florida this 8 day of August 1988.

UNITED STATES DISTRICT JUDGE

c.c: to all counsel of record

EXHIBIT 42

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MATHAS BROWN,

PLAINTIFF,

vs. CASE NO. 87-6936
CIV-RYSKAMP

CITY OF FORT LAUDERDALE, a municipality, CONSTANCE W. HOFFMAN, in her official capacity as City Manager of the City of Fort Lauderdale, RON COCHRAN, in his official capacity as Former Police Chief of the City of Fort Lauderdale Police Department,

DEFENDANTS.
_____/

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiff Mathas Brown, files this memorandum of law in support of his Opposition to the Defendants Motion to Dismiss the Second Amended Complaint and would state as follows:

1. INTRODUCTION

The plaintiff Mathas Brown not only claims that the City of Fort Lauderdale

(City) did not follow the proper procedures in dismissing him, but that the dismissal was unsubstantiated and justified by racial discriminatory acts. The City of Fort Lauderdale's Police Department is currently under a 1980 Consent Decree from the federal courts because of the hiring and promotion practices it has conducted throughout the years regarding blacks and other minorities. Apparently, the federal court agreed with the feasibility of possible racial discrimination being conducted at the City of Fort Lauderdale's Police Department, in light of the Consent Decree regarding minorities. Unfortunately the plaintiff is a product of the City's continuing practice of racial discrimination.

At the time of the plaintiff's initial employment with the City of Fort Lauderdale's police department, there were approximately thirty (30) black officers as compared to approximately five hundred

(500) white police officers. Throughout the plaintiff's five and one half (5½) year tenure with the City's police department, the department managed to maintain approximately thirty (30) black police officers. That's not to say that the City has retained the original thirty black officers, but they did somehow manage to keep the number of black police officers employed by the police department to approximately thirty(30). The City of Fort Lauderdales' police department also throughout the plaintiffs' tenure, had one (1) black officer in a supervisory (Sergeant) position. There were no black officers (other than the one Sergeant) in any other supervisory position.

If the court will allow this complaint to proceed to the discovery status, the plaintiff through statistical data will attempt to show the court that during the plaintiffs' tenure with the City of Fort Lauderdale's police department,

there was no policy effectuating racial discrimination, but the conduct of the City's agents represented an ongoing custom of racial discrimination.

42 U.S.C. §1983 and §1981

A. ALLEGATIONS ESTABLISHING A VIOLATION

Provisions of 42 U.S.C. §1983 establishes a federal cause of action for damages against state and local officials who have caused individuals to suffer constitutional deprivation, and is designed to protect individuals against a misuse of powers made possible only because the wrong doer is clothed with the authority of state law. Duchesner v. Sugarman, 566 F.2d. 817.

The plaintiff seeks relief under 42 U.S.C. §1983 and §1981, and did allege facts that the City's agents referenced in second amended complaint, did effectuate a custom of racial discrimination

under color of state law. The cause of action pursuant to 42 U.S.C. §1983 is supplied by the fact that the named defendants are City officials acting in behalf of the City of Fort Lauderdale.

The plaintiff makes reference to numerous discriminatory acts, particularly one directly involving defendant Ron Cochran. The plaintiff described in his second amended complaint section 17(e), a Report Improvement Course he was required to attend, by former police chief Ron Cochran. The plaintiff missed ten of the twenty four hours of the course because of doctor appointments, physical therapy appointments, and periodic illness due to back injury he sustained while in the commission of his official duty. Ron Cochran uses the missed hours to justify his termination of the plaintiff. The termination letter has been submitted as EXHIBIT B in the second amended complaint. The plaintiff names numerous white police

officers sustaining physical injuries while on duty, that were afforded an opportunity to miss work for doctor appointments, physical therapy appointments, and the natural healing process of the injury. These officers, still employed with the City's police department, were not penalized as the plaintiff was for having to miss work.

Defendant, Ron Cochran knew of the plaintiff's back injury, yet he deliberately held the plaintiff accountable for the missed hours of the course despite the plaintiff's plea to be temporarily excused. The plaintiff attended the writing course when the injury would permit such attendance. This however, wasn't good enough for Ron Cochran, for he felt that injury or no injury, the plaintiff should have attended <u>all</u> of the twenty four hours of the course. Ron Cochran did not exhibit this attitude or line of thinking when white officers named in 17(e) of the second amended complaint, missed work for

their injuries. Every one of the white officers named in section 17(e) of the second amended complaint is still employed by the City of Fort Lauderdale's police department.

One of the officers mentioned in section 17(e) of the plaintiff's second amended complaint, is a perfect example of the racially discriminating customs conducted at the City's police department. The plaintiff mentions that Captain Joseph Robinson (Captain of Detectives) was involved in an automobile accident in which he left the scene of the accident. In fact, Sergeant B. W. Smith, had to go to Captain Robinson's home and return him to the scene of the accident after it's commission. Captain Robinson left his gun, badge, and blue light in the vehicle, which eventually led to the deduction that he had been driving the vehicle. Leaving the scene of an accident is a third degree felony in violation of Florida Statute

316-027. Thus, Captain Joseph Robinson, who in fact, committed a crime, did not have to fear termination like the plaintiff, because he is white, and subsequently subjected to a different standard than the plaintiff.

Former Police Chief Ron Cochran apparently felt that a crime did not warrant the disciplinary measure of termination, for he did not terminate or demote Captain Robinson. The plaintiff, on the other hand, was accused (questionably) of writing deficiencies, for he did in fact, terminate the plaintiff. Thus we have a Chief of police who would rather retain a white police officer who has committed a crime, before he would retain a five and one half (5½) year black veteran, questionably accused of writing deficiencies.

The defendants quite naturally, do not feel that this incident is an example of the City's customs or practices of

racial discrimination, and wish to not answer this portion of the second amended complaint. However, the plaintiff not only finds it important that Captain Robinson retained his position and employment, but he, unlike the plaintiff, was allowed to miss work because of injuries he sustained during the commission of the accident. Thus, this is an extremely relevant issue in the second amended complaint, in that it helps to establish the racially discriminating customs of the defendants. That is unless the defendant Constance Hoffman, is unaware of the acts, be they criminal or not, of her subordinates.

2. The defendants state in their motion to dismiss the second amended complaint, that the plaintiff's performance ratings had been unsatisfactory. The defendants were aware that the plaintiff was attempting to have his last performance rating

appealed. Yet, he was terminated before the appeal of the performance rating could take place. The defendant, Ron Cochran, even went as far as to falsely state that the plaintiff had received his required ninety day reevaluation, one can say that Ron Cochran deliberately lied when he stated that the plaintiff had received the required ninety day reevaluation.

On April 9, 1986, the plaintiff attended an E.E.O.C. hearing regarding the discriminatory practices at the City's police department. During the hearing (which was past the period when the reevaluation was due), Sergeant Raymond stated, in front of witnesses, that he had not done the plaintiff's reevaluation. Yet former Chief Cochran states in his termination letter (EXHIBIT B) that the plaintiff did receive the required ninety day re-evaluation in the prescribed time period, and that the reevaluation was unnsatisfact-

ory. Furthermore, after the initial ninety day review period had expired, the plaintiff, who was still employed by the City's police department, was no longer a marginal employee, but instead, was automatically raised to the status of a satisfactory employee. Thus, the defendants RonCochran and Constance Hoffman, terminated a satisfactory employee. White officers with satisfactory status, are not terminated as the plaintiff was. This act by the defendants, is contrary to an honest belief; the absence of malice; and the absence of design to seek an unconscionable advantage. Therefore the defendants, Constance Hoffman, and Ron Cochran are not entitled to the qualified immunity defense of good faith. For their actions were indeed intentional.

3. The plaintiff has clearly outlined the practices or customs, of racial discrimination conducted at the City of Fort

Lauderdale's police department, in his second amended complaint. Some of these acts are even criminal in nature, but the officers involved in the crimes are white, and subjected to a different custom than the plaintiff. This accounts for the fact that they are still employed by the City's police department, even after having committed a crime.

4. The defendants state in their Motion to Dismiss the second amended complaint, that the plaintiff was offered a proper pre-termination hearing. No mention is made about the fact that Ron Cochran was not empowered to terminate the plaintiff. Considering that Ron Cochran could not terminate the plaintiff, how could he give the plaintiff five days in which to discuss the matter with him. Another important issue to be considered, is that the defendant Ron Cochrandid not provide the plaintiff with sufficient notice as

to what rights were being jeopardized, and what procedures were available to him to assure that his grievance would be redressed fairly. The plaintiff was merely told that he had five days in which to request a hearing with the defendant Ron Cochran.

The defendants feel that Ron Cochran's giving the plaintiff five (5) days to request a hearing regarding his termination, was sufficient notice for a proper pre-termination hearing. The defendants also feel that the letter the plaintiff received from Constance Hoffman, (which didn't tell the plaintiff anything regarding a pre or post termination hearing), was proper and just. The defendants cite what they consider to be the relevant portions of the Unions contract, regarding appeals of, suspensions, demotions, or dismissals. They however, do not state what portions of the contract, if any, that the plaintiff should have

adhered to, regarding an appeal of a dismissal, when terminated by the Chief of police. The defendants outlined sections 4.0 to 4.6 as it pertains to appeal procedures regarding suspensions, demotions, or dismissals, but these procedures are only applicable if you have been terminated by the City Manager.

The defendant, Constance Hoffman, also did not provide the plaintiff with sufficient notice as to what rights were being jeopardized, and again, what procedures were available to him to assure that his grievance would be redressed fairly. She simply informed the plaintiff that she had reviewed the circumstances, and concurred with his termination.

5. The defendants next state in their Motion to Dismiss the second amended complaint, that the plaintiff must allege how the procedures utilized by the City, violated his civil rights. In accordance

with 42 U.S.C. §1983 as quoted by the defendants, in their motion to dismiss, "The complaint must set forth facts from which it can be determined that the City established and effectuated a policy or custom of racial discrimination, or that the conduct of any of the City's agents represents the custom, policy or practice of the City.

The operative word in the above description of 42 U.S.C. §1983 is "custom". The plaintiff is not alleging that the City or its' agents effectuated a policy of racial discrimination, but he is alleging that agents of the City, through their conduct, effectuated a custom of racial discrimination, which is also evidenced by the need for the previously mentioned, consent decree. The customs of the City's agents, is clearly outlined in the second amended complaint's "Instances of Discriminatory Acts." Every act stated in this

section of the complaint, is racially discriminating, and prohibited by the Constitution of the United States and 42 U.S.C. §1983 and §1981.

Thus, the plaintiff is again stating, as he did in his second amended complaint, that the policies established by the City and it's agents did not racially discriminate against the plaintiff, but those empowered to enforce these policies, did in fact conduct and promote racial discrimination, through their long standing customs and practices of treating black officers, and white officers, differently.

6. The plaintiff has addressed his request for assistance from the Police Union, and has submitted into evidence his request, and their negative response to that request. The plaintiff has also submitted into evidence the manner in which the Union adheres to its own guidelines, which is simply not to follow them

at all. The defendants still insist, that despite the Unions deviation from it's own enacted rules, the plaintiff should be seeking a remedy to this matter from the Union. The defendants, have even taken the trouble to outline the relevant portions of the Unions contract regarding grievances. Considering that the Union does not adhere to it's own guidelines, how is the plaintiff to know what to do to effectuate procedures for dispute resolutions? The plaintiff does wish to utilize his Due Process rights regarding the issues at hand, and is desperately attempting to do so, through the federal courts.

B. PUNITIVE DAMAGES

The defendants, and this court, have clearly established that Punitive damages may not be awarded against a municipality. A municipality, for all intent and purposes, is a City, town, village, borough, or

other district incorporated for local self government.

The plaintiff is not requesting that Punitive damages be awarded against the City of Fort Lauderdale, but he is requesting Punitive damages be awarded against defendants, Constance W. Hoffman and Ron Cochran. Defendants Constance Hoffman and Ron Cochran were aware of the racially discriminating customs and practices of the agents of theCity of Fort Lauderdale's police department. Ron Cochran participated in this custom, in his refusal to allow the plaintiff to attend the Report Improvement course at a later date, for health reasons. He then used the hours of the course that the plaintiff missed, to justify his termination of the plaintiff. Defendant Constance Hoffman admitted that she had reviewed the circumstances surrounding the plaintiff's termination, and agreed to his being terminated by the defendant,

Ron Cochran. The Instances of Discriminatory Acts, outlined in the second amended complaint did occur, and Constance Hoffman's review of the circumstances simply mean that she was aware of the questionable practices and customs of the City's agents, toward black officers. Thus the wanton, willful, deliberate, and intentional acts of the defendants, nullifies the defense of good faith, and violates the Fifth and Fourteenth Amendments of the United States Constitution.

C. LEAVE TO AMEND COMPLAINT

On April 14, 1988, Honorable Judge Kenneth Ryskamp, issued an order of dismissal to the plaintiff's complaint and amendment, with leave to amend the complaint within thirty (30) days. The judge cited in his order that a pro se ... complaint is governed by 'less stringent standards than formal pleadings drafted by lawyers."

The order also stated, the amended complaint "should not be dismissed unless it appears that the plaintiff can prove no set of facts which would entitle him to relief." The plaintiff is desperately attempting to have a hearing of this case on it's merits, in the federal court.

The plaintiff has alleged numerous violations of his rights by thedefendants, covering the following areas:

1. Breach of contract
2. Racial Discrimination
3. Constitutional Amendment Rights
4. Due Process Rights
5. Violation of His Civil Rights...

and probably some the plaintiff is unaware of because he is not an attorney. The plaintiff has elaborated on numerous points relevant to substantiating a cause of action or claim, pursuant to both 42 U.S.C. §1983 and §1981. In fact, ALL of the Instances of Discriminatory Acts,

cited in the plaintiff's second amended complaint, are relevant to both 42 U.S.C. §1983 and §1981. They are relevant in that they allege facts of racial discrimination being a continued custom practiced at the City's police department. The reasons given for the plaintiff's employment termination from the City's police department, were simply used as a pretext to the discriminatory actions and customs practiced at the police department.

WHEREFORE, based upon the foregoing reasons, the plaintiff prays that this court GRANTS this motion to dismiss, and accepts all portions of the second amended complaint, as it is brought pursuant to 42 U.S.C. § 1983 and §1981.

Respectfully submitted

MATHAS BROWN

EXHIBIT 43

No. 88-5673

JURISDICTIONAL QUESTION(S)

1) Whether the June 21, 1988 order dismissing certain claims on the basis of qualified immunity is not an appealable order as to the plaintiff but would only be appealable if it denied the defense? Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); Riley v. Wainwright, 810 F.2d 1006, 1007 (11th Cir. 1987).

2) Whether the order appealed was not a final order because it disposed of fewer than all claims of all parties to the action? 28 U.S.C. §1291; Fed.R.Civ. P. 54(b); Williams v. Bishop, 732 F.2d 885 (11th Cir. 1984); In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982).